[Case Title] In re: Donald R. Atkerson, Debtor
[Case Number] 83-00651
[Bankruptcy Judge] Arthur J. Spector
[Adversary Number]XXXXXXXXXX
[Date Published] December 16, 1985

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

In re: DONALD R. ATKERSON,

Case No. 83-00651
Chapter 11

Debtor.
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APPEARANCES:

JOHN J. HEBERT
Attorney for Debtor

D. KEITH BIRCHLER
Attorney for Akron State Bank

MEMORANDUM OPINION REGARDING
MOTION OF AKRON STATE BANK FOR
RECONSIDERATION OF CLAIM AND REHEARING ON
CONFIRMATION OF DEBTOR'S CHAPTER 11 PLAN

At a session of said Court held in the Federal Building in the City of Bay City, Michigan on the 16th day of December, 1985.

PRESENT: HON. ARTHUR J. SPECTOR
U.S. BANKRUPTCY JUDGE

On September 12, 1985, the Court conducted a hearing on confirmation of the debtor's Chapter 11 plan of reorganization. At that time, Akron State Bank appeared and objected to the proposed plan. It stated that it held a second mortgage on a parcel of the debtor's real property as security for the debtor's non-recourse guarantee of a debt of a corporation in which a principal, which mortgage was not mentioned in the debtor's schedules, disclosure

statement or proposed plan of reorganization. Moreover, since the plan provided that all property dealt with therein would be free and clear of all claims and interests of creditors, the bank feared that the mortgage would be extinguished by the plan if approved. In the debtor's schedules, he listed a first mortgage indebtedness to State Bank in the amount of $35,000; in the proposed plan, he proposed to satisfy this claim by giving the bank a deed to part of the property in lieu of foreclosure, and paying the remaining balance due from the proceeds of sales of other property owned by the debtor. At the hearing, the Court held that it would approve the plan (subject to some amendments not relevant here) over the oral objections of the bank; however, before an order confirming the plan could be entered, the bank filed the instant motion for reconsideration. Since the order confirming the plan had not yet been entered, the instant motion is timely, pursuant to Rule 17k of the Local Rules of the United States District Court for the Eastern District of Michigan.

We deny the bank's motion for reconsideration. Rule 17k(3) provides generally that one moving for reconsideration of an order "must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof." In this case the bank goes to some length to show that had the second mortgage been reasonably disclosed or acknowledged, the debtor's plan would not have met the standards necessary for confirmation pursuant

to 11 U.S.C. §1129.

Although the bank's analysis of the ramifications of what would have occurred if it had timely objected or otherwise brought its second mortgage to the Court's attention appears valid, the bank must also show a material, obvious defect in the proceedings or in the proofs that resulted in the Court's erroneous approval of the plan. In the case at bar, the debtor scheduled a mortgage to Akron State Bank of approximately $35,000. It did not list the second mortgage anywhere in its schedules. The debtor's approved disclosure statement dealt only with the $35,000 mortgage, and the plan proposed to pay to the bank only the debt owing on this mortgage. The bank had notice of the debtor's Chapter 11 petition and the contents and omissions from the schedules. The bank was given notice of the deadline for filing proofs of claim (in this case May 23, 1985), the hearing on approval of the disclosure statement; indeed, it appeared through counsel at that hearing, and was given notice of the hearing on the confirmation of the plan which stated the deadline for filing objections to the proposed plan (September 9, 1985). The bank voted its ballot on its first mortgage in favor of the plan. Notwithstanding that it had ample notice of these facts and these deadlines, it neither filed a proof of claim nor filed an objection to the debtor's proposed plan.[1]

[1]The Bankruptcy Rules, by expressly addressing situations such as the one herein, serve to further negate any inference that the debtor's failure to list all of his obligations to the bank caused a material defect in the proceedings. Bankruptcy Rule 3002(b)(1)

Instead, it simply appeared at the hearing on confirmation and asserted, through counsel, that there was another mortgage debt which would be extinguished if the plan were confirmed. The bank was given the opportunity to present proofs as to the nature, extent and validity of this alleged mortgage but declined to do so. Tr. at 35. To our knowledge, the bank has even yet not filed a proof of claim; the first actual evidence of the purported mortgage was attached this motion for reconsideration. In short, there is no way we can find that the bank or the Court was misled by any of the proceedings herein. Thus, the bank has not established a basis for granting a motion for rehearing or reconsideration under Rule 17k, Bankruptcy Rule 9023, or F.R.Civ.P. 59.[2]

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provides that "the schedule of liabilities filed by the debtor pursuant to $521(1) of the Code shall constitute prima facie evidence of the validity of claims of creditors." The rule further provides that a creditor whose claim is not scheduled, or listed as disputed, contingent or unliquidated must file a proof of claim and upon the creditor's doing so, its proof of claim shall supersede the claim scheduled by the debtor. Rule 3002(c)(2), (4). Thus, once the bank had notice of the debtor's bankruptcy case and disagreed with the statement of the debt as scheduled, it was the bank's duty to file its own proof of claim which would then supersede the debtor's statement of the debt. Because the bank failed to file a proof of claim, the Court was entirely justified in administering the case and ruling on confirmation of the debtor's plan based on the presumption that the debtor's statement of the claim was accurate.

[2]The bank also argues with regard to Rule 17k that the debtor must be presumed to have known of the existence of the unlisted mortgage, and that its failure to list it in the schedules or plan constitutes a palpable defect in the proceedings. We find this assertion unpersuasive. First, as already noted, the bank had more than adequate notice of the debtor's statement of its claims and could easily have corrected the mistake by filing a proof of claim or objection to confirmation in a timely fashion. Second, we are not

In light of the above facts, the only other ground for not entering the formal order confirming the plan would be if the bank could show excusable neglect on its part, that is, that its failure to timely file a proof of claim listing the second mortgage or to timely object to the debtor's proposed plan of reorganization could be excused. F.R.Civ.P. 60(b)(1); Bankruptcy Rule 9024. On this point, the only argument that the bank makes is that the attorney who represented it through the hearing on confirmation was inexperienced with regard to bankruptcy matters and was ignorant of the necessity to file a proof of claim listing all claims of Akron State Bank against the debtor and to object to the debtor's proposed treatment of these claims in its plan of reorganization. We reject this argument. It is incumbent upon counsel representing any party in this or any other court to be aware of the standards of law and deadlines applicable in the particular case. The failure of counsel to take the steps necessary to protect the interests of its client due to ignorance or inexperience do not rise to the level of the sort of excusable neglect contemplated by Rule 60, and thus are not grounds for setting any order or judgment of the Court. In re South Atlantic Financial

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entirely persuaded that the claim is one which should have been listed on the debtor's schedules at all. As noted above, the mortgage at issue here was a non-recourse mortgage given by the debtor to guarantee the indebtedness of a corporation of which the debtor was apparently a principal. Thus, the note and mortgage are not a "claim against the debtor. 11 U.S.C. $101(4). Although it may be an in rem claim against the estate, it is not obvious that such claims need listed on the debtor's schedules. If it should be listed anywhere, it would be on Schedule A-2.

Corp., 767 F.2d 814 (llth Cir. 1985); cf., In re Earl Roggenbuck Farms, Inc., 51 B.R. 913 (Bankr. E.D. Mich. 1985).

Therefore, we find that there are insufficient grounds to delay or reconsider entry of the order confirming the debtor's plan, or to undo the proceedings taken so far to allow the bank time now to file and prove its late claim, and object to the debtor's plan of reorganization. We properly determined whether the debtor's plan should be confirmed on the basis of all the facts which were before the Court. That determination should stand. Accordingly, the Court will enter an order denying the bank's motion for reconsideration and the order confirming the debtor's fourth amended plan of reorganization subject to the modifications referred to at the hearing on September 12.

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ARTHUR J. SPECTOR
U.S. Bankruptcy Judge